IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1241

PEPI, INC., PHILIPS ELECTRONIC INSTRUMENTS, INC. and NORTH AMERICAN PHILIPS CORPORATION,
Petitioners,

v.

PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March 16, 1979

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Unable to distinguish and apparently unwilling to address the principal authorities relied on in the Petition, the Brief in Opposition glosses over the significant issues concerning dual distribution and paints this as a price-fixing and horizontal conspiracy case. Neither characterization is correct.

1. **This Is Not a Price-Fixing Case.** The price-fixing count dropped out of this suit on the first appeal, when the Court of Appeals held that the trial judge had improperly denied Philips' motion for judgment n.o.v. on that count. (22a). After the remand for a second trial on damages, the District Judge did characterize Philips' territorial restrictions as "part and parcel" of price-fixing

(60a-61a), but that conclusion was fabricated out of whole cloth and is without support in the record. The question of whether price-fixing and the territorial restrictions were intertwined was never submitted to the jury, and there was no finding of such an interrelationship. The territorial restrictions were completely unnecessary for any enforcement of resale prices, and were not so used.[1]

In contrast, *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 720 (1944), cited by Pitchford, involved a customer restriction which forbade resales by wholesalers to price-cutting retailers. This restraint was the very means of unlawfully maintaining retail prices and was part and parcel of price-fixing. *White Motor Co.* v. *United States*, 372 U.S. 253, 260 (1963), also cited by Pitchford, undermines, rather than supports Pitchford's attempt to create an implicit link between pricing and territories. In *White Motor* there *was* a finding of price-fixing, but this Court held that the territorial restrictions which were also involved should have been tested independently under the rule of reason since there had been no finding that they were integral to the price-fixing. Pitchford also cites *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967), where there was no price-fixing, ancillary or otherwise.[2] While we do not dispute the *dicta* in these cases—to

[1] The Hawaiian incident described by the Court of Appeals (30a) and relied upon by Pitchford (Brief in Opposition 9-10) was not an example of enforcing territorial restrictions to fix prices, but, if anything, exactly the opposite. The fact that Philips solicited bids from all of its dealers in response to this inquiry demonstrates that the territorial limitations were not being used as a device to fix prices. Had Philips desired to fix prices in Hawaii by use of the territorial restrictions, it could have simply forbidden all but one dealer from selling there.

[2] In *Schwinn* the District Court rejected the charge of price-fixing and the Government did not appeal from this determination. *See* 388 U.S. 365 at 368.

the effect that territorial restrictions intimately bound up in price-fixing are illegal—none of the cases supports Pitchford on its facts.

Price-fixing and territorial restrictions in the present case were not "ancillary," not "integral," and not "part and parcel" of one another. The conclusion reached below that Pitchford was injured by reason of the territorial restriction but was not injured by reason of price-fixing underscores the fact that one was truly divorced from the other. *Cf. Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

2. **There Was No Horizontal Conspiracy in This Case.** Pitchford maintains that even if not tied up with price-fixing, the territorial restraints in this case were horizontal. But it does not even try to dispute the authorities cited in the Petition which hold that restraints such as these must be treated as vertical. Pitchford totally sidesteps *Schwinn, White Motor, Coca-Cola* and the other decisions cited at pages 10-11 of the Petition, saying that "[t]hose cases are vertical." (Brief in Opposition 14). Of course they are vertical—that is the proposition for which they were cited. More significantly, they are analogous to the arrangement in this case, which is also vertical. For its own part, Pitchford proffers only *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973), which, as explained in the Petition (at page 18) was an erroneous decision from the *Schwinn* era.

Pitchford professes that the territorial restrictions here were horizontal because Philips and the dealers entered into "explicit" agreements limiting each dealer to a territory. (Brief in Opposition 11-12). Certainly there were agreements, and being in writing they were explicit rather than implicit. But similar agreements existed in cases such

as *White Motor* and *Coca-Cola*, as well as in most other vertical restriction cases where dual distribution was not present. The fact that there were agreements does nothing to demonstrate horizontality.

Pitchford also claims that the territorial restrictions were horizontal because Philips was "polic[ing] a division of markets for the benefit of horizontal competitors." (Brief in Opposition 13). Pitchford cites *Topco* as authority, but as discussed in the Petition, *Topco* involved a division of territories organized by a group of dealers which actually controlled the manufacturer. (Petition 9 & n.10).[3] Here the restraints were imposed unilaterally by Philips, and the fact that some dealers may have complained that neighboring dealers were ignoring the restraints is of no consequence. It is only fair that a dealer confined to a territory would expect that if he cannot sell in his neighbor's territory, his neighbor should not be permitted to sell in his.

> "A combination violative of Section 1 of the Sherman Act cannot be implied from the fact that some . . . customers complained . . . since it was the normal working of the market place for them to have done so."

Carbon Steel Products Corp. v. *Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S.D.N.Y. 1968). *Accord, Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 523 F.2d 668, 675 (9th Cir. 1975); *Carr Electronics Corp.* v. *Sony Corp.*, No. C-76-2741 AJZ, slip op. at 9-10 (N.D.Cal. filed Feb. 28, 1979).

[3] While Pitchford tries to make an issue of the fact that Philips did not itself manufacture all of its products, the term "manufacturer" in this context is a common shorthand denoting any manufacturer, franchisor, licensor or other supplier which sells goods and/or licenses patent or trademark rights to distributors. *See e.g.* ABA ANTITRUST SECTION, MONOGRAPH NO. 2, VERTICAL RESTRICTIONS LIMITING INTRABRAND COMPETITION 3 (1977).

Pitchford points out that its territory was "surrounded" by the territories of various Philips branches; but analytically this is of no consequence. The branches were not permitted to sell in Pitchford's territory and therefore posed no threat to Pitchford. More importantly, the procompetitive effects of territorial restraints, focusing each dealer on the interbrand competition within its own territory, are the same regardless of which dealers or branches are operating beyond the borders. Illustrative is *Edwin K. Williams & Co.* v. *Edwin K. Williams & Co.-East*, 377 F. Supp. 418, 424-25 (C.D. Cal. 1974), *aff'd in relevant part*, 542 F.2d 1053 (9th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), where a licensor assigned to its only distributor the territory east of the Mississippi and sold directly itself west of the Mississippi. Since the licensor imposed the restraint unilaterally it was held to be vertical, and the fact that the distributor was, in effect, "surrounded" by the licensor was immaterial.[4] Moreover, in this case, as the Court of Appeals pointed out, Philips had re-evaluated its distribution system in the late 1960's and was in the process of gradually replacing its dealerships with branches. (28a). Such transformations are not uncommon, and as has been widely held, are not unlawful. *Call Carl, Inc.* v. *BP Oil Corp.*, 554 F.2d 623, 628 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Beltronics, Inc.* v. *Eberline Instrument Corp.*, 509 F.2d 1316 (10th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975); *Bushie* v. *Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Varney* v. *Coleman Co.*, 385 F. Supp. 1337 (D.N.H. 1974). The fact that during the relevant period there were more branches than dealers around Pitchford's territory

[4] In its petition for certiorari the distributor argued, much like Pitchford, that the decision below "directly conflict[ed] with this Court's decision in *Timkin*, *Sealy* and *Topco*." Petitioner's Brief for Certiorari at 25 (No. 76-910, filed Dec. 31, 1975).

does not alter the vertical nature of the territorial restraints imposed.[5]

Trying once more to distinguish *Sylvania,* Pitchford notes that Philips had a larger market share than did Sylvania. (Brief in Opposition 15). This goes to the *reasonableness* of the restraints, something the jury never had an opportunity to assess. Pitchford also suggests that the territorial restrictions here should be illegal *per se* because they were part of an "aggregation" of restraints. (Brief in Opposition 16). But this was not the finding of either of the courts below. Pitchford further argues that this case was tried under the rule of reason and Philips simply failed in its proof. (*Id.*). That totally disregards the critical fact that the jury was instructed under a *per se* standard.

Finally, Pitchford argues that in any event, this case is not worthy of certiorari because the only opinion at issue in its view is that of the District Court, which it claims was a "purely factual determination." (Brief in Opposition 18). The District Court's contorted analysis and misinterpretation of *Sylvania* is more than a "purely factual determination," however, and if not corrected, will stand as an irrational and destructive precedent injecting needless confusion into a widely applicable area of law.

CONCLUSION

The District Court, having been instructed by the Court of Appeals to determine whether the original decision and *Sylvania* were inconsistent (52a), should have ordered a new trial to permit the jury to consider the pro-competitive effects of the territorial restraints. This issue was not submitted to the jury, despite the fact that *Sylvania* explicitly reserved the determination of reasonableness to the trier-of-fact. Because of this, and on the grounds set forth in the Petition, we respectfully request that a writ of certiorari be granted.

[5] While there were five branches adjacent to Pitchford's territory at this time, there were also two dealers.

March 16, 1979

Respectfully submitted,

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